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No. 07-926

In the Supreme Court of the United States

AUGUSTA N. ROMAN, PETITIONER,

VS.

RANDY M. ROMAN, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 17, 2008, and (2) grant the petition. As grounds for this motion, petitioner states the following:

Review by this Court is necessary to clarify whether and how constitutional norms apply to the relationship between genetic and intended parents and the *ex corporeal* human embryos created through an *in vitro* fertilization process ("IVF"). This is an important question that impacts infertile men and women, physicians and scientists involved in reproductive medicine, and government officials responsible for protecting the public's health and safety.

Twelve percent of American women of childbearing age have used an infertility service. Centers for Disease Control and Prevention *et al.*, 2005 *Assisted Reproduction Technology Success Rates: National Summary and Fertility Clinic Reports* 1 (2007). Seven percent of all married couples that include a woman of reproductive age are unable to conceive a child within one year of uncontracepted sex. *Id.* at 3. While millions of these couples have used IVF over the past quarter century, the process is expensive, time-consuming and fraught with difficulties. *See id* at 1. When deciding to undergo this process, it is critically important that

these couples know their rights and obligations, including those arising under the Constitution. The present case presents an ideal opportunity for this Court to provide some certainty as to the constitutional rights and obligations of those couples.

Whether progenitors of *ex corporeal* embryos have constitutional rights related to the embryos created is also important to physicians and scientists involved in reproductive medicine. The medical profession is largely self-regulating, as are many scientific groups. As such, professional rules define these professionals obligations regarding consent of patients or subjects of inquiry, standards of care or protocols during treatment or experimentation, and obligations of follow-up or continued monitoring of results. These rules and attendant procedures will differ if constitutional limitations or rights exist between sperm and egg donors and the embryos they create. For example, members of a committee established by the National Academy of Sciences recently confronted the question of whether the informed consent of anonymous sperm donors was required in cases where excess embryos were to be used for research. In attempting to balance the gamete donors' expectations with the desires of the research community for access to additional embryos, the committee looked to the number of cases that would be impacted by a rule change. National Research Council and Institute of

Medicine, *2007 Amendments to the National Academies' Guidelines for Human Embryonic Stem Cell Research* 12 (2007). Ultimately the committee recommended continuing to require consent. This result would likely have been the same if the committee knew that gamete providers have constitutional rights, but the committee's rationale, and thus the outcome of future decisions, might have differed.

The constitutional status of the relationship between genetic parents and *ex corporeal* embryos is also of great concern to legislators and other state officials. Sixteen states currently have some statutes addressing the creation, implantation, and disposition of human embryos. National Conference of State Legislatures, *State Laws on Frozen Embryos: Gamete (Egg/Sperm) and Embryo Disposition*, at http://www.ncsl.org/programs/health/embryodisposition.htm (last visited April 10, 2008). This legislative session Arizona, Indiana, New Jersey, and West Virginia are considering similar legislation. S.B. 1208, 48th Leg., 2nd Reg. Sess.(Ariz. 2008); H.B. 1075, 2008 Reg. Sess. (Ind. 2008); S.B. 147, 2008 Reg. Sess. (Ind. 2008); A.B. 1281, 213th Leg. (N.J. 2008); and H.B. 4463, 78th Leg., 2nd Sess. (W.Va. 2008). All of these laws are subject to the constitutional constraints of due process, equal protection and privacy, yet there is no guidance from this Court on the application of those constraints to assisted reproductive technologies. Thus, when

disputes arise regarding these statues, government officials and lower courts are left to infer the proper constitutional standards from the text of the Constitution and the cases of this Court interpreting that text in clearly distinguishable fact patterns. See President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY: REGULATION OF THE NEW BIOTECHNOLOGIES 69 (2004) (noting that the most common cases involving assisted reproductive technologies ("ART") arise from conflicts over "the custody or disposition of untransferred embryos and rights and obligations of those standing in direct relationship to them."). It is important to the development of law in this area that this Court defines the basic application of constitutional norms to ART.

For almost twenty years lower courts have been struggling with the question of whether and how constitutional constraints apply to ART. Since the early Tennessee trial court decision in *Davis v. Davis*, No. E-14496 (Tenn. Cir. Ct. Sept. 21, 1989) (Westlaw at 1989 WL 140495), judges have been confronted with questions regarding the proper legal framework for deciding who controls the disposition of *ex corporeal* embryos. These cases have arisen, not only in disputes between wives and husbands, but also between fertility clinics and genetic parents, intended and gestational parents, and institutions sponsoring fertility clinics and renegade

professionals. *See York v. Jones*, 717 F. Supp. 421 (S.D. Va. 1989) (dispute between genetic parents and fertility clinic); *Prato-Morrison v. Doe*, 126 Cal. Rptr.2d 509 (App. 2 Dist., 2002) (plaintiffs unable to establish that they were the intended parents of the child born through the use of IVF); and Stone *v. Regents of University of California*, 92 Cal. Rptr.2d 94 (App. 4 Dist., 1999) (member of medical faculty was not entitled to university-funded defense to claims of "embryo-stealing"). The lower courts have differed dramatically in their conclusions regarding whether constitutional protections apply. *Compare Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), cert. denied sub nom. *Stowe v. Davis*, 507 U.S. 911 (1993) (constitutional concerns are determinative) and *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (no constitutional rights were implicated). This has led to the development of a confused body of law that fails to provide the stability and certainty that is required when dealing with questions of human reproduction. Only a ruling by this Court can bring order to this chaotic jurisprudence.

The present case, involving only claims by the genetic parents, is the ideal vehicle for pronouncing the application of constitutional norms in this area. Unlike more complex questions that arise in cases involving different genetic, intended, and gestational parents, the questions present in *Roman v. Roman*, while legally complex, are factually straightforward:

1. Whether the fundamental right to procreate is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means;

2. Whether the constitutional liberty interest in decisions whether to bear or beget a child encompasses a right to deny implantation of embryos in a genetic parent who desires the implantation; and

3. Whether the fundamental right to enter into familial relationships is violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means.

This Court should provide much needed guidance to the lower courts regarding the application of constitutional protections and limitations to assisted reproductive technology by granting this petition for rehearing and vacating the denial of the petition for certiorari in this case.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Teresa S. Collett, counsel of record in the above-captioned case, certify that this petition for rehearing is limited to the grounds specified in Supreme Court Rule 44.2, and is presented in good faith and not for purposes of delay.

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Teresa S. Collett